Filed 7/3/19 Marriage of Sexton CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of PAULEEN M. SEXTON and JAMES S. SEXTON.	
PAULEEN M. SEXTON, Appellant, v. JAMES S. SEXTON, Respondent.	A153901 (Contra Costa County Super. Ct. No. D14-05746)

Pauleen Sexton appeals from the denial of her request to set aside the judgment entered on a marital settlement agreement. She contends she was improperly denied an evidentiary hearing and rejection of her claims was an abuse of discretion. We affirm.

BACKGROUND

Appellant filed a petition for dissolution of the parties' 37-year marriage in December 2014. In January 2016, the parties stipulated to the appointment of attorney Neville K. Spadafore as temporary judge "for all purposes." (Cal. Const. art. VI, § 21; Cal. Rules of Court,[1] rules 2.830-2.834; *Hayward v. Superior Court* (2016) 2 Cal.App.5th 10, 18.)[2] A judgment dissolving marital status was filed on May 23, 2016.

[1] Further references to rules will be to the California Rules of Court.

[2] The stipulation and order specified that the temporary judge would have "the power to enter any orders he feels necessary in regard to pendente lite relief, contempt,

According to the court's subsequent "Judicially Supervised Settlement Conference Agreement and Order (CCP 664.6)" (September 22 order), at a settlement conference on July 8, 2016, the parties "entered into agreements resolving outstanding Dissolution of Marriage issues," these agreements were orally stated by the court, "upon voir dire by the court, each party orally confirmed his/her understanding and willing approval of the agreements as recited by the court," counsel for each party confirmed the "accuracy and completeness of the court's oral recitation of the agreements entered into by the parties," and "each party represented that he/she freely and voluntarily approved these agreements free of any claim of coercion or undue influence or duress." No court reporter was present, and no written agreement was signed.

After the July 8 settlement conference, the court prepared a draft "Judicially Supervised Settlement Conference Agreement and Order," which was sent to counsel on July 13 with a request to review the draft and submit "proposals of correction, additional [*sic*] and deletions as deemed appropriate." The parties exchanged proposals for modifications but were unable to come to agreement,[3] and a case management conference was held on September 21, 2016, at which the parties and court went through the drafts page-by-page, the parties' indicating their respective positions as to whether certain proposed changes were consistent with or varied the agreement reached on July 8. The court then drafted the September 22 order based on its review of counsels' comments and requests at the case management conference and the court's "notes and recollections" from the July 8 conference. The September 22 order concluded, "The Judicially

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and any other matters within the authority possessed by a Judge of the Superior Court so as to effectuate ultimate disposition of the controverted issues in this proceeding."

For convenience, we will refer to Temporary Judge Spadafore as "the court" or "the judge."

[3] Appellant's attorney proposed various modifications to the court's draft, many of which respondent's counsel stated "varie[d] terms of agreement stated 7/8/16" or added terms not included in that agreement. Respondent's attorney offered a draft that accepted other changes that respondent found acceptable, and proposed additional changes.

Supervised Settlement Conference Agreement and oral Order of the Court of July 8, 2016, are hereby ratified by the court in the written form herein set forth."

The September 22 order detailed the disposition of the parties' real and personal property. Of particular relevance here, the business entity Z-Line Designs, Inc. (Z-Line) was awarded to respondent, including "all assets and all debts and liabilities," and specifying that this award "includes, but is not limited to, the award of all fixtures, equipment, aircrafts, accounts receivable, patents and intellectual property, goodwill/branding, overseas (China) operations, funds on deposit in bank accounts, etc." Respondent was ordered to pay appellant the "tax free sum of $1,500,000" (which was at that time being held in his attorney's trust account) within 24 hours of the judge signing the order. Respondent was also ordered to pay retroactive temporary spousal support for October 15, 2015, through December 31, 2015, in an amount to be determined by the court after a hearing, and it was specified that any period of temporary spousal support for January 1, 2016, forward would end when respondent paid to appellant the full $1.5 million settlement, as would the court's jurisdiction to award further spousal support. The parties mutually waived exchange of final declarations of disclosure.

In a telephone conference on September 23, appellant's attorney expressed objections to the September 22 order, claimed to have been surprised by the nature of the September 21 proceeding, and asserted grounds for setting aside any order rendered by the court pursuant to Code of Civil Procedure section 664.6. The court withdrew the September 22 order and gave counsel another opportunity to review its contents and "formally indicate, by signatures indicating approval, or by withholding of such signatures, each attorneys' and each party's respective approval or disapproval." Respondent and his attorney signed; appellant and her attorney did not. Meanwhile, in anticipation of appellant not approving the final form of the order, the court gave respondent permission to file a request for entry of judgment pursuant to Code of Civil Procedure section 664.6.

Respondent filed the request for entry of judgment on October 4, 2016. Appellant's opposition included her own declaration and those of her attorney and

forensic accountant, who had attended the July 8, conference, all stating that they left the conference believing that although the framework of a settlement was discussed, disputed issues remained, no enforceable settlement was reached and negotiations would continue. Appellant stated that she understood she was going to be held harmless from all liabilities related to Z-Line in exchange for giving up her interest in "a several million dollar corporation for zero value" and agreeing to terminate spousal support after one year. [4]

The court's order granting respondent's request for entry of judgment pursuant to Code of Civil Procedure section 664.6, filed on December 13, 2016, stated that the statute does not require the parties to enter stipulations before a court reporter, but rather that they present oral stipulations before the court,[5] and that subsequent disputes are not evidence that an enforceable agreement was not reached. The court reiterated that with the concurrence of counsel, the parties had entered agreements on several significant issues; these agreements were orally recited by the judge; and upon voir dire by the court, the parties confirmed their understanding and willing approval. The court found the declarations submitted on behalf of respondent were consistent with its recollections of the circumstances and events of July 8, the factual assertions in the declarations submitted on appellant's behalf were "largely lacking in credibility," and the September

[4] Appellant's declaration also described feelings of stress, fear and anxiety due to contact with respondent, and feeling "exhausted and overwhelmed" at the July 8 settlement conference; a declaration from her therapist described exacerbation of her symptoms, the medications she was taking, and her mental state at the time of the settlement conference. The court stuck appellant's statements about her mental state, and the therapist's declaration in its entirety, as irrelevant to the issues before the court.

[5] Code of Civil Procedure section 664.6 was enacted in 1981 and, prior to 1993, provided simply, "If parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." The statute was amended in 1993 to provide, "If parties to pending litigation stipulate, in *a* writing *signed by the parties outside the presence of the court* or orally *on the record* before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." (Stats. 1993, ch. 768, § 1, italics added.) A further amendment in 1994 *deleted* the "on the record" language." (Stats. 1994, ch. 587, § 7.)

22 order "accurately sets forth the parties' agreements which were orally approved as an Order of the Court on July 8, 2016."

The order granting respondent's request for entry of judgment included a "Judicially Supervised Settlement Conference Agreement and Order" (December 13 order), also filed on December 13, 2016, that contained the same substantive provisions as the September 22 order. A final judgment on reserved issues, incorporating the December 13 order, was filed on December 19, 2016. Appellant did not appeal.[6]

On February 10, 2017, appellant filed a request for order setting aside the judgment on grounds of fraud, duress and mistake pursuant to Family Code[7] section 2122 and Code of Civil Procedure section 473, subdivision (b) and seeking "100% of undisclosed assets pursuant to Family Code section 1101, subdivision (h), reopened discovery, and attorney fees. In addition to her previous assertion that she left the July 8, 2016, settlement conference understanding that a general framework for settlement had been proposed but no enforceable agreement had been reached, appellant claimed that respondent had omitted material information from his preliminary declaration of disclosure. In particular, appellant stated that respondent's preliminary declaration of disclosure stated the value of Z-Line as "to be determined," and she had since received "no further information regarding valuation of Z-Line Designs, Inc., nor the nature and extent of Z-Line's assets" despite respondent having signed a waiver of final declaration of disclosure indicating he had " 'fully augmented the preliminary declarations of disclosure,' " including disclosure of all material facts and information on valuation of community property assets, and acknowledging that failure to comply with disclosure obligations would result in the court setting aside the judgment. Appellant further stated

[6] Appellant states in her opening brief on this appeal that she "elected not to appeal the court's Order under [Code of Civil Procedure section 664.6] so as to preserve and advance her Request For Order to set aside the judgment, which is the subject of this appeal (a choice largely forced upon her by a combination of filing deadlines and calendaring issues)."

[7] Further statutory references will be to the Family Code except as otherwise specified.

that she had learned of the existence of patents owned as community property, by respondent individually or by Z-Line; of the existence of entities she had not been aware of until an IRS audit inquired about them; and of the sale of a Falcon Jet owned by Z-Line, the proceeds of which were not deposited into a Z-Line account. Appellant additionally stated that respondent had not disclosed $1,300,000 proceeds from sale of a community property warehouse in Livermore, undertaken without appellant's knowledge or consent, which respondent had deposited into a newly opened and undisclosed account in the same of Sexton Investment Group, LLC.[8]

The majority of the declaration appellant's attorney submitted in support of her set aside request was stricken, primarily on grounds of res judicata/collateral estoppel and/or improper argument.[9] The remaining portions stated that counsel had previously emphasized concern over the facts that Z-Line was operated by respondent as an " 'S' Corporation," that disallowance of any business deductions would result in increased personal tax liability, and that the "magnitude of the potential disallowance of such expenses is extreme" due to personal use of business assets and improper deductions; stated that the court "orchestrated the two (2) step process for addressing what occurred on July 8, 2016 in his Order After Telephone Case Management Conference on October

[8] Appellant also raised a claim of duress, reiterating statements that had been stricken from her declaration opposing entry of judgment, and adding that she perceived the judge to be biased against her due to his refusal to award temporary support or set a trial date, his reversal of his original representation that he would set a valuation date for Z-Line, and his failure to take any action to hold respondent accountable for his "numerous, demonstrable misappropriations of community assets (of which [the judge] was well aware following two days of trial on these issues on May 10, 2016 and May 19, 2016), failure and refusal to meaningfully disclose and value assets under his control, and breaches of fiduciary duty in the management and control of Z-Line Designs."

[9] Stricken statements in the declaration included that "no voir dire was conducted on July 8, 2016 and neither party was sworn in or testified under oath," that if the parties had actually reached agreement, the proceedings would have been recorded, that the court had misrepresented conversations concerning tax liability, and that counsel made clear at the July 8 settlement conference that appellant would not accept the language the court proposed regarding this liability.

13, 2016," and that both parties' "issues with anxiety, prescriptions medications and (in the case of respondent) alcohol abuse have been continually referenced and acknowledged"; and asked, "[h]ow could your declarant and petitioner have agreed to the July 13, 2016 draft and on July 8, 2016 other than by mistake?"

At a telephone case management conference on March 17, 2017, the court granted appellant permission to initiate discovery relevant to her request for order and set a hearing for May 4 to address, if necessary, discovery issues the parties were unable to resolve. The court set a hearing on appellant's request to set aside the judgment for August 23 and 24, 2017.

On April 17, 2017, respondent filed his responsive declaration to appellant's request for order setting aside the judgment. After stating his agreement with the court's description of the process by which agreement was reached at the July 8 conference, respondent stated that appellant had "an awareness and involvement with Z-Line Designs operation based on her presence as an 'executive' of Z-Line Designs over a period of 18 years," obtained information regarding the business operations "during the term of her employment (through October 15, 2015)," and thereafter had "voluminous records and information" about such operations "made available" to her and her representatives "both formally and informally." Respondent stated that records and documents were provided to appellant "on a continuing basis throughout this litigation" by Marcie Martinez, chief financial officer (CFO), and he provided a list of the "records, documents, and information provided" and copies of the "correspondence, subpoenas, transmittals and documents . . . detailing the information provided." Respondent noted that appellant's attorneys took the deposition of John Negovetich, former chief operating officer (COO), and had the opportunity to question respondent, Martinez, and Z-Line's accountant, Jack Chu, at an evidentiary hearing on May 10 and 19, 2016.

Addressing appellant's claims of " 'undisclosed' matters" and information not provided, respondent stated that appellant was aware Z-Line had "certain patents on office furniture designs, wall mountings for television sets, etc.," that such patents were property of the company and "for the most part" were "outdated, as is our product line,"

and that the parties' settlement agreement and judgment specifically dealt with the patents; that the business entities appellant claimed to have no knowledge of were "inactive, defunct and generally non-existent as of March 2016 or before"; that appellant had been provided with an accounting showing all the proceeds from the sale of the warehouse were deposited as capital contributions to Z-Line; that she was aware of the sale of the Falcon jet from testimony at Negovetich's deposition and bank records subpoenaed by her attorneys; and that appellant was present at meetings regarding efforts to sell Z-Line at which Negovetich encouraged the parties to accept a sale for one million and then, after further discussion with appellant's attorney and accountant, it was agreed that efforts would be made to obtain two million.

On April 24, 2017, respondent filed a request for order asking the court to dismiss appellant's request to set aside the judgment, after a non-evidentiary hearing, on the basis that she had "failed to make a prima facie showing that [she] was misled or defrauded"; to stay respondent's obligations under the judgment pending final determination of the validity and enforceability of the judgment; and for other related relief.

At the May 4 discovery hearing, the court set a briefing schedule for both appellant's motion to set aside the judgment and respondent's request to dismiss appellant's motion. The parties agreed to submit respondent's request for determination on the pleadings; as will be seen, there is some dispute as to the extent of appellant's agreement to submit her motion to such determination. After confirming that appellant was not going to appeal the December 19 judgment, the court prohibited further discovery regarding the entry and terms of the July 8, 2016, settlement agreement, "as these matters are now res judicata." The court allowed specified discovery relevant to the set aside motion and spousal support, emphasizing it was not to be duplicative of earlier discovery.[10] After continued disputes over the scope of appellant's discovery requests, the court filed a protective order on September 19, 2017, imposing

[10] The court found that appellant's counsel "did not proceed in good faith to meet and confer with reference to the outstanding discovery issues in the manner explicitly ordered by the court in its March 17, 2017 Case Management Conference Order," and

limitations on requests for duplicative discovery and disallowing further discovery in specified areas, including patents.[11]

Also on September 19, 2017, appellant filed a request for order seeking disqualification of Temporary Judge Spadafore pursuant to Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii) Respondent filed "preliminary exceptions" to the disqualification motion, after which the court filed a lengthy and detailed order striking appellant's request for order and supporting pleadings as untimely filed and disclosing no legal grounds for disqualification (Code Civ. Proc., § 170.4, subd. (b)). Appellant filed a petition for writ of mandate and request for stay, which this court summarily denied (case No. A096393), and the California Supreme Court denied her petition for review (case No. S245739).

On January 19, 2018, the court filed findings and orders on both appellant's request to set aside the judgment and respondent's request for dismissal of appellant's request. The court rejected appellant's claim of mistake as a basis for setting aside the judgment as barred by collateral estoppel because the question whether an enforceable settlement occurred on July 8, 2016, had been conclusively resolved by the court's decision on the motion to enter judgment. The court found appellant's assertions regarding the alleged insufficiency of material facts provided in respondent's preliminary declaration of disclosure insufficient to require setting aside the judgment because such preliminary declarations "are only the first formal effort required of each party to quantify the nature and extent of the marital estate and the respective financial positions of each party" and are "prepared with the expectation and understanding that they are always subject to further augmentation as additional information becomes available

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directed respondent's counsel to submit his oral request for discovery sanctions in writing.

[11] At the May 4 hearing, the court had imposed upon appellant the burden of showing why requests for patents and intellectual property should be approved "if specific discovery requests" were made, "given the fact that the parties' Judgment specifically awards all such patents and intellectual property of Z-Line Designs to [respondent]."

during the ongoing course of the legal proceeding." The court rejected appellant's claims of inadequate subsequent disclosure in a lengthy discussion of evidence (in the record, and provided with respondent's declaration) that refuted appellant's claims, and appellant's failure to respond to this showing.[12] The court concluded, "In summary, [appellant] has failed to make a *prima facie* showing warranting relief from Judgment taking into account of the entire record of the proceedings prior to entry of the Judgment. [Appellant] has failed to present a *prima facie* showing that a miscarriage of justice has occurred. She has also failed to show that she would materially benefit from a Judgment set aside. With all the evidence available to the court, it is clear that a Judgment set aside would not materially affect the judicial outcome provided in the existing Judgment and would not materially benefit [appellant] even if, arguably, any viable basis for judicial set aside were found by the court, which is not the case herein."

The court additionally addressed the $1.5 million settlement payment, granting respondent's request to stay his obligation to pay this sum if appellant did not execute the document necessary to transfer her interest in Z-Line to him, but noting that prompt payment would be required if she executed the document. The court reserved jurisdiction over the issue of a starting date for accrual of interest on the $1.5 million that appellant had tendered in September 2016, as well as over the issues of attorney fees and spousal support.

This appeal is from the court's January 19, 2018 findings and orders.

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[12] The court rejected appellant's claim of duress because her "conduct during and shortly after the July 8, 2016 Settlement Conference confirm that [appellant] entered into the settlement agreement of her own free will and without coercion or duress." The court stated that "no evidence of duress was revealed to the court" by appellant or her attorney during the all-day settlement conference, the court conducted a voir dire in which it had each party confirm that the agreements were being entered freely, knowingly and voluntarily. The court noted that it had stricken the declaration of appellant's therapist (for reasons stated in an earlier order) and appellant had "failed to provide the court with any convincing evidence to substantiate her assertions of duress," and declined to receive further evidence or argument on the issue.

DISCUSSION

I.

Appellant contends the court violated section 217 and rule 5.113(b) by refusing to allow an evidentiary hearing on her request to set aside the judgment and failing to make findings justifying that refusal. She argues that section 217 precludes reliance on inadmissible hearsay over a party's objection, and contends the judge's refusal to hold an evidentiary hearing deprived her of her right to cross examine respondent about matters such as the assertions in his declaration that appellant knew about patents and entities she claimed he had failed to disclose.

Section 217 provides, in pertinent part: "(a) At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties. [¶] (b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing."

Rule 5.113(b) provides, "In addition to the rules of evidence, a court must consider the following factors in making a finding of good cause to refuse to receive live testimony under Family Code section 217: [¶] (1) Whether a substantive matter is at issue—such as child custody, visitation (parenting time), parentage, child support, spousal support, requests for restraining orders, or the characterization, division, or temporary use and control of the property or debt of the parties; [¶] (2) Whether material facts are in controversy; [¶] (3) Whether live testimony is necessary for the court to assess the credibility of the parties or other witnesses; [¶] (4) The right of the parties to question anyone submitting reports or other information to the court; [¶] (5) Whether a party offering testimony from a non-party has complied with Family Code section 217(c); and [¶] (6) Any other factor that is just and equitable." Subdivision (c) of this rule provides, "If the court makes a finding of good cause to exclude live testimony, it must

state its reasons on the record or in writing. The court is required to state only those factors on which the finding of good cause is based."

Appellant relies upon *In re Marriage of Swain* (2018) 21 Cal.App.5th 830, 837, which held that "section 217, when considered in light of its legislative history and the case law leading to its adoption, precludes reliance on inadmissible hearsay over a party's objection (subject to the good cause provision of [section] 217, [subdivision] (b)), at least where the party has no opportunity for cross-examination." In that case, the husband seeking modification of spousal support objected to the court considering the wife's income and expense declaration because she did not appear for the hearing and could not be cross examined. *Swain* held that the court erred in considering the declaration over the husband's objection. (*Id.* at pp. 841–842.)

Respondent argues that the present case differs from *Swain* because appellant specifically agreed to have her request to set aside the judgment determined on the pleadings, never objected to this procedure and never asked to present oral testimony or cross-examine respondent before the matter was submitted. As respondent points out, "section 217 does not mandate live testimony when the parties indicate their desire to rely solely on declarations. Rather, the right to live testimony may be forfeited." (*In re Marriage of Binette* (2018) 24 Cal.App.5th 1119, 1127 (*Binette*).)

Respondent's assertion that appellant stipulated to having her request for order decided on the pleadings mischaracterizes the record. Respondent's brief states that "at the May 4, 2017 hearing, [appellant's counsel] stated: 'I have no problem with the submission [of appellant's RFO] on the pleadings . . . .' " The bracketed text added to this quote changes the meaning of what appellant's counsel actually said, which was simply, "I have no problem with the submission on the pleadings." Read in context, it is clear that counsel was agreeing to have *respondent's* request for order determined on the pleadings, not appellant's. The discussion was about scheduling respondent's request for order for a hearing and, when scheduling became problematic, submitting the matter on the pleadings. Although respondent's stated objective at the May 4 hearing was to expedite the court's ruling on both his motion and appellant's, in the hope of avoiding

discovery that would not be necessary if the court determined that appellant's request to set aside the judgment could not go forward, various comments made clear that the matter to be submitted on the pleadings was respondent's request to dismiss. For example, when the judge referred to "the one specific issue" he would "take under submission when I've got the pleadings," with "other issues related to the RFO . . . reserved for" a hearing date to be scheduled," appellant's attorney asked for clarification of the "one issue," and both respondent's attorney and the judge responded that it was the "prima facie showing" and argument that appellant was "not even permitted to go forward" because she "hasn't made a prima facie case." The court maintained the August dates that had previously been set for hearing appellant's set aside request.[13]

Nevertheless, the record reflects that counsel for appellant agreed, or at least did not object, to having her request for order setting aside the judgment determined on the pleadings to the extent the court found the issues did not require additional evidence. Such agreement, which the court recited on the record and in its order following the May 4, 2017, hearing, was a necessary corollary of counsel's affirmative agreement to submission on the pleadings of respondent's request for dismissal: Resolution of respondent's contention that appellant had not made a prima facie showing of entitlement to relief would necessarily entail consideration of the issues raised in appellant's set aside

[13] Appellant's counsel further indicated that the discussion was about respondent's request for order in commenting, "I have raised no objections to a submission on the pleadings on the basis that there are no factual issues warranting testimony that makes sense in determining their motion, if I'm not incorrect. [¶] The court has to interpret all of the allegations made in our pleadings in our favor. . . ." The court's order following this hearing stated that appellant's attorney "indicated petitioner's agreement to submit the petitioner's April 24, 2017 RFO issues to the court, on the pleadings provided as of June 19, 2017, to the extent that there are no factual issues requiring testimony or receipt of additional evidence by the court before rulings can be made." The court's reference to "Petitioner's April 24, 2017 RFO issues" appears to be an error: April 24, 2017, is the filing date for respondent's request for orders including dismissal of appellant's request for set aside of the judgment.

request and, to the extent the court agreed with respondent, determination of appellant's request. The parties' stipulation to continue the date set for trial of appellant's request to set aside the judgment acknowledges as much in its introductory statement: "An evidentiary hearing is currently scheduled for August 23-24, 2017 on Petitioner's Request for Order filed February 10, 2017 and on Respondent's Request for Order filed April 24, 2017, to the extent *such requests are* not sooner disposed of in a more summary fashion, as set forth in the Case Management and Discovery Hearing Orders of May 4, 2017, filed with the court on June 22, 2017."

Where a party fails to request oral testimony, section 217 does not preclude the court from proceeding without it. (*Binette, supra,* 24 Cal.App.5th at pp. 1127–1129, 1132.)[14] As respondent notes, appellant does not point to any indication in the record that she asked to present oral testimony on her motion to set aside the judgment. Her response to respondent's motion to dismiss her set aside request did not mention oral testimony or section 217. Instead, it argued that respondent's request for dismissal sought summary adjudication of her request in violation of rule 5.74(b),[15] which prohibits the use of demurrers and motions for summary adjudication or summary judgment in family law cases, and that she had made a prima facie showing of grounds for setting aside the judgment. Treating the request for dismissal as a request for summary adjudication, appellant addressed the merits by invoking the statutes and caselaw

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[14] In *Binette,* the wife sought to vacate a default judgment on grounds including the husband's failure to disclose relevant information and mistake of fact. On appeal from the order granting the motion to set aside the judgment, the husband argued that the trial court erred in failing to receive live testimony at the hearing. The court had asked whether the parties intended to present testimony and the husband's attorney had indicated he might, depending on the court's tentative decision, but after the court recited the documents it had reviewed, husband's attorney relied upon the documents in his argument and did not ask to present testimony. *Binette* held these actions "indicate[d] an implicit agreement between the parties to rely on the documents submitted" and the husband had forfeited his right to raise the issue on appeal. (*Binette, supra,* 24 Cal.App.5th at pp. 1130–1131.)

[15] Rule 5.74(b)(2) provides: "Demurrers, motions for summary adjudication, and motions for summary judgment must not be used in family law actions."

governing motions for summary adjudication and summary judgment and arguing that respondent had not met his initial burden of making a "prima facie showing of the nonexistence of any triable issue of material fact" (Code Civ. Proc., § 437c; *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826.)[16]

Respondent did not move for summary adjudication: He did not refer to Code of Civil Procedure section 437c, submit a statement of undisputed facts or attempt to establish the nonexistence of any triable issue of fact.[17] He simply asserted that appellant, as proponent of a request to set aside the judgment, had not met her burden of producing evidence in support of the motion (see *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 88–89 [moving party on section 2122 challenge bears burden of proof]; Evid. Code, § 550, subd. (b) ["burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact"]), and asked the judge to determine this factual issue on the pleadings because, in light of the extensive record in the case, an evidentiary hearing was unnecessary. (See *In re Marriage of Hixson* (2003) 111 Cal.App.4th 1116, 1124–1125 [upholding denial of discovery on postjudgment claim of unadjudicated community asset where moving party failed to present evidence or argument undermining exhaustive prejudgment record].)

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[16] Appellant's assertion in her reply brief on this appeal that her objection to "summary adjudication" "conclusively disproves the assertion that she agreed to waive hearing" begs the question. Objecting to summary adjudication necessarily reflects a wish for full determination of the merits including a weighing of factual evidence, but such a determination does not necessarily require live testimony.

[17] Appellant argues that "the substance" of respondent's request for order of dismissal was a request for summary adjudication, as demonstrated by his reliance below on *In re Marriage of Georgiou and Leslie* (2013) 218 Cal.App.4th 561, a case that predated rule 5.113(b), and upheld the trial court's grant of summary adjudication. Respondent had cited this case for the proposition that a family court may deny a postjudgment motion without an evidentiary hearing where the moving party fails to make a prima facie showing warranting relief. The primary authority for his argument below was *In re Marriage of Hixson*, *supra*, 111 Cal.App.4th 1116, which did not involve summary adjudication.

If appellant's point is that she opposed "summary adjudication" in a more general sense—summarily deciding the issues without a hearing—it was not made in the briefing to which she cites. Having failed to raise the issue of oral testimony or cross-examination under section 217 or rule 5.113 with the court below, and having agreed to the procedure employed by the court as described above, appellant cannot now obtain relief by relying on section 217. As we have said, section 217, subdivision (b), allows for proceedings without live testimony in these circumstances.

Moreover, as in *Binette*, the judge here implicitly found good cause for deciding the issues without live testimony. (§ 217, rule 5.113(b).) The court made clear both on the record at the May 4 hearing and in its orders that it would not decide on the pleadings any issue as to which it found additional evidence would be necessary; the procedure it adopted specifically maintained previously set hearing dates for any issues that could not be decided on the pleadings. The court's January 19, 2018 findings and orders presented a lengthy and detailed discussion of the of the parties' pleadings and documentation in the case record. In proceeding as it did, the court clearly had considered whether substantive matters were at issue (rule 5.113(b)(1)), material facts were in controversy (rule 5.113(b)(2)) or live testimony was necessary (rule 5.113(b)(3)). (See *Binette, supra,* 24 Cal.App.5th at p. 1132 [if court refused live testimony, it made a sufficient finding of good cause].) To the extent the court could be seen as having been required to comply with rule 5.113, its decision to decide the matter on the pleadings implicitly reflects a determination that these factors provided good cause for forgoing live testimony. [18]

[18] Appellant's opening brief refers repeatedly to the judge having granted respondent's Code of Civil Procedure section 664.6 motion despite the absence of a signed writing or record memorializing the settlement. Respondent devotes a considerable portion of his brief to the argument that a signed writing or record of the proceedings is not an essential prerequisite to enforcement of a settlement agreement, prompting appellant to argue that respondent mischaracterized her argument on appeal as a claim that the absence of a signed writing or transcript of the settlement conference permitted her to renege on the settlement. As we understand it, appellant's point is not that a signed writing or transcript is always a prerequisite to enforcement of a marital settlement agreement, but that the absence of a signed writing or transcript bolsters her

II.

Section 2121 gives courts authority to relieve a spouse from a judgment adjudicating support of division of property upon finding "that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from granting of the relief." Section 2122 sets forth the grounds for setting aside a judgment: actual fraud, perjury, duress, mental incapacity, mistake, or failure to comply with disclosure requirements. Appellant contends the trial court erred in denying her request to set aside the judgment on grounds of mistake of fact and deficient disclosure. (§ 2122, subd. (e), (f).)

"We review the trial court's decision in ruling on the motion to set aside the judgment and the motion to set aside the marital settlement agreement to determine if the trial court abused its discretion. (*In re Marriage of Rosevear* [(1998)] 65 Cal.App.4th [673,] 682–683; *In re Marriage of Varner* [(1997)] 5 Cal.App.4th [128,] 138.)" (*In re Marriage of Brewer v. Federici* (2001) 93 Cal.App.4th 1334, 1346 (*Brewer*).) The complaining party bears the burden of establishing an abuse of discretion. (*In re Marriage of Rosevear*, at p. 682.) We review the court's factual findings for substantial evidence, resolving all conflicts in the prevailing party's favor, and indulging all legitimate and reasonable inferences so as to uphold the court's finding if possible. (*In re Marriage of Rossi* (2001) 90 Cal.App.4th 34, 40.)

A.

California "has a strong policy of ensuring the division of community and quasi-community property in the dissolution of a marriage as set forth in Division 7 (commencing with Section 2500), and of providing for fair and sufficient child and spousal support awards. These policy goals can only be implemented with full disclosure of community, quasi-community, and separate assets, liabilities, income,

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claim that no agreement was in fact reached at the July 8 settlement conference. Regardless, the decision to enforce the agreement under Code of Civil Procedure section 664.6 is not at issue here, as appellant did not appeal the judgment.

and expenses, as provided in Chapter 9 (commencing with Section 2100), and decisions freely and knowingly made." (§ 2120, subd. (a).) "[A] full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage," and "each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts." (§ 2100, subd. (c); *In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252, 1270.)

"[S]pouses may be relieved of a stipulated judgment based upon incomplete or inaccurate information," including a failure to "disclose the existence or the value of a community asset." (*Brewer, supra*, 93 Cal.App.4th at p. 1345; *In re Marriage of Varner, supra,* 55 Cal.App.4th at p. 144.) Here, appellant maintains that respondent failed to augment his preliminary declaration of disclosure (§ 2105), in violation of his "duty to provide an 'accurate and complete disclosure of all assets and liabilities' of the parties at the time of the negotiations surrounding the stipulated judgment." (*Varner,* at p. 143.) Specifically, appellant argues respondent's preliminary declaration of disclosure listed the value of Z-Line as "[t]o be determined" and did not list any patents as assets of Z-Line or of respondent individually; and respondent did not represent, and the court did not find, that the subsequently produced documents providing valuation information (listed in exhibit A to the court's September 19, 2017, protective order) were sufficient to determine the company's value.

Appellant's argument focuses largely on what she describes as the "undisclosed patents." Respondent stated in his responsive declaration that appellant was aware Z-Line had "certain patents on office furniture designs, wall mountings for television sets, etc.," that such patents were property of the company and "for the most part" were "outdated, as is our product line," and that the parties agreement and judgment enforcing

it specifically dealt with the patents. In finding that appellant failed to make a prima facie case for set aside of the judgment on this ground, the judge stated that "[t]he fact that no response was provided to respondent's assertion that [appellant] had prior long standing knowledge of certain patents owned either by respondent and petitioner as community property or as assets of Z-Designs, Inc." was "telling" because "the record is clear that the parties and counsel specifically identified, as one of the settled items in the July 8, 2016 Judicially Supervised Settlement of the parties, was the agreement that all Z-Line Designs patents and intellectual property were awarded to [respondent] as an element of award to him of the full ownership of Z-Line Designs, Inc. [Appellant's] silence regarding this fact leads the court to conclude that her prior statement in paragraph 11 of her Declaration in support of her RFO (to the effect that it was only after the Settlement Conference on July 8, 2016 that she '. . . learned of the existence of certain patents owned either by respondent and petitioner as . . . assets of Z-Line Designs, Inc., which were not included in Respondent's Preliminary Declaration of Disclosure'), was not a true and accurate statement."[19]

Appellant argues that the judge improperly imposed a duty on her to rebut respondent's assertion that she was aware of the existence of property that respondent did

[19] Similarly, the court discussed appellant's failure to respond, in her reply brief, to respondent's explanations concerning entities appellant claimed to have been unaware of, or to respondent's assertion that appellant had been provided on April 1, 2016, with a detailed accounting of the proceeds of sale of the Livermore warehouse. The court found the latter "telling" because it was aware this information had been provided on April 1, 2016, and since its case management findings stated there were no outstanding issues regarding those funds, appellant and her attorney knew this issue had been resolved before the July 8 conference and her complaint about lack of disclosure was therefore unfounded.

The court also found appellant's claims regarding the sale of the Falcon Jet were refuted by records respondent provided showing appellant was aware of COO Negovetich's January 2016 testimony regarding the sale, and records appellant subpoenaed from Comerica Bank in May 2016 confirming deposit of the proceeds, yet appellant continued to claim respondent had not produced documentation of the disposition of the proceeds.

not disclose, which she claims to have become aware of after execution of the parties' waiver of final declarations of disclosure, deprived her of the opportunity to cross examine respondent about his unsubstantiated assertions, and absolved respondent of his fiduciary duties and duty to disclose. To the contrary, the judge's order reflects a determination that the express inclusion of the patents in the stipulated judgment indicates appellant was aware of them, and appellant's failure to contest respondent's assertion that this was the case indicated her claim of ignorance was not accurate.

A settlement offer respondent proposed on July 5, 2016, ahead of the July 8 settlement conference, expressly referred to "patents" as included in the proposed award of Z-Line to respondent. The judgment stated, "There is no evidence in the record that any concern was ever expressed by [appellant] or her counsel related to the details regarding patent ownership and/or valuation either prior to or at the time leading up to and including the July 8, 2016 Settlement Conference. Rather, the evidence is clear that no patent issues were raised in the course of the July 8, 2016 Settlement Conference prior to the time that [appellant] agreed that [respondent] would receive full ownership of all patents and intellectual property owned by Z-Line Designs." Appellant has not pointed to anything in the record undermining the court's conclusion.

As to the valuation of Z-Line generally, the court described at length its reasons for concluding the evidence did not support appellant's assertions that she had insufficient information and that respondent failed to augment his preliminary declaration of disclosure (which stated the company's value as unknown). The court stated that appellant's reply brief failed to acknowledge the "voluminous additional disclosures" made by respondent after his preliminary declaration of disclosure and before the July 8, 2016 settlement conference; that appellant had engaged in "substantial formal and informal discovery" over a period of months in which she, her attorneys and her forensic accountant "obtained significant additional documentation and information about all aspects of the parties' marital estate"; and that appellant was inaccurate in declaring that she had received no further information from respondent regarding valuation of Z-Line or the nature and extent of its assets since respondent filed his preliminary declaration of

disclosure. The court explained that in case management and settlement discussions over several months there were "ongoing discussions about the valuation of Z-Line Designs, Inc. and the available options for dividing this community property asset," "[i]nformation and documentation was provided to [appellant's] counsel and forensic accountant in an ongoing updating process," "[j]oint discussions were held regarding the feasibility of seeking a third party sale of the business and weighing the pros and cons of such an effort," and "evidence of [COO] John Negovetich's prior unsuccessful efforts to negotiate the sale of the company, at a value that would have netted the parties $2 million . . . was clearly known to both parties." The court noted that there was discussion about it "reserving jurisdiction over the division/disposition of Z-Line Designs, Inc., in order to provide the parties with additional time to attempt to complete a sale of the business to a third party buyer" because the parties' initial positions regarding valuation of the company were "sufficiently at odds that the award of the business entity to one party or the other was not initially identified in the July 8, 2016 settlement negotiations as being a viable prospect," but that after further discussion and negotiation, the parties agreed to award the business to respondent "including assignment to him of all liabilities related to that entity, effective as of January 1, 2016. The court further found that respondent was in "no better position" than appellant to understand the value of the company as of the July 8 settlement date "as both parties had the same information in hand regarding this business, including the same information about the uncertain marketability of this asset," and that after further discussion and negotiation both "concluded that settlement was preferable to continued litigation regarding these issues, including the delays attendant to further attempts to complete a business sale, as well as the risks and costs attendant thereto."

The court also noted the declaration of the company's CEO attesting that appellant was an employee through October 2015, and "came to the business location in San Ramon to obtain information regarding business operations during her term of employment," and thereafter " 'voluminous records and information' were made available" to appellant and her representatives. The court discussed in detail the

declarations of appellant's forensic accountant, Jeff Stegner, which the court found did not support appellant's complaints "to any significant degree" and in fact "in large part support[ed] the assertions made in respondent's opposition to [appellant's] requests." Stegner acknowledged having received a significant amount of information from the company, and the court found that while he identified several requests for documents that were not provided prior to the July 8 settlement conference, Stegner did not say the allegedly missing information was "identified as being of material significance for the settlement discussions" or that any demands were made at that time indicating receipt and review of that information was a prerequisite to settlement.[20] The court further stated that it was "well aware that such demands were not made by counsel for either party during the course of the Settlement Conference on July 8, 2016."[21] In addition to these

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[20] The court described Stegner as not contesting the accuracy of Z-Line's CEO's declaration that " 'over 5,000 pages of information' " had been provided. Stegner's declaration stated that the CEO's declaration "notes that 'over 5,000 pages of information' has been provided. This case has complicated financial circumstances and documents are voluminous. I do agree that [the CEO] has provided a significant amount of information, however I have repeatedly requested additional information and records that have not been provided."

[21] The court went on to say, "To the contrary, each party and counsel understood that, in reaching full settlement of the Dissolution of Marriage issues that were resolved on that date, each party would be waiving receipt of additional information and further follow up on prior requests for information, to the extent allegedly not previously provided. Nothwithstanding that fact, both parties and their attorneys agreed to full resolution of the outstanding issues that were before the court which were addressed at that time."

Appellant views this statement as absolving respondent of his statutory disclosure obligations. We disagree. We understand the court's statement to be addressing the parties' discovery process, making the straightforward point that in agreeing to settle a particular issue, the parties necessarily agree to forego further investigation into it. The court was responding to the claim that certain documents sought by appellant's accountant had not been produced by describing the absence of any reason to believe the allegedly missing information was considered to be of material significance at the point the parties reached settlement. This is not inconsistent with the principle appellant relies upon, that respondent had a "duty to provide an 'accurate and complete disclosure of all assets and liabilities' of the parties at the time of the negotiations surrounding the stipulated judgment." (*In re Marriage of Varner, supra,* 55 Cal.App.4th at p. 143.) We

observations by the court, we note that when asked at a hearing on May 10, 2016, whether he had sufficient information in his possession or available to him to put a value on the business as of December 31, 2015, Stegner said "I believe so. I may need some other management interview type questions to be asked, but it should be able to be completed in relatively short order."

We find no basis for concluding the court erred in finding that appellant failed to make a prima facie showing of insufficient disclosure in support of her request to set aside the judgment. Moreover, appellant did not make any showing that she would materially benefit from the requested relief being granted, as is required under section 2121, subdivision (b). In this regard, appellant's opening brief on appeal quotes her argument below, stating that the amount awarded to her in the judgment " 'barely covered sums owed to her for repayment of a loan to the community . . . , reimbursement for half the proceeds of the sale of the Livermore, California warehouse that respondent attempted to steal from [appellant], and an equalizing payment for the automobiles awarded to respondent. Thus, respondent was awarded Z-Line Designs, Inc. for zero value by terms of the "settlement" forced upon [appellant] by this court. Therefore, [appellant] will materially benefit from the set aside of the Judgment. In addition to requesting an immediate post-set aside order from this court regarding the reimbursements due . . . , [appellant] will seek her community property share of Z-Line Designs, Inc., which by any conceivable measure will be valued at more than zero. Thus, [appellant] will materially benefit from the set aside of this Judgment.' " Appellant further notes that the " 'settlement' imposed upon [her] included a termination of spousal support after one year on a 37-year marriage.' "

The court below saw the issue differently. The court found "no foundation" for appellant's assertion that the settlement provided her with "no value for relinquishment of

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have no reason to doubt the court would have given appropriate consideration to evidence that respondent attempted to hide information relevant to determination of the value of the parties' assets at the time of the settlement.

her ownership interest in Z-Line Designs, Inc. and relinquishment of her support entitlement," and found her claim was "presented with unreasonably selective description of the parties' entire settlement process and the details related thereto." The court stated that appellant "ignore[d] or minimize[d] the risks assumed by the respondent pursuant to his agreement to assume 100% ownership of Z-Line Designs, Inc. and to be responsible for all liabilities related to the corporation from January 1, 2016 onward," which obligations and risks included respondent's "assumption of full responsibility for substantial outstanding loan obligations owed by Z-Line Designs, Inc. at that time and the companies' uncertain credit status with its lenders" and "the risk of lower profitability based upon increased business competition and the company's likely need for larger cash reserves in order to finance the operations of the company while awaiting payment of increasingly aged company account receivables as a result of changes in major customer payment practices." The court found that appellant's characterization of the settlement also ignored that respondent/Z-Line was required to provide approximately $230,000 additional funding of the company's retirement plan in order to allow both parties to obtain full distributions of their retirement accounts, a funding liability that appellant did not share; ignored appellant's "ownership of a multimillion dollar estate, which was almost entirely held in liquid assets/investments, based upon her receipt of other elements of the parties' community property division of substantial value prior to the July 8, 2016 Settlement Conference," as well as her "entitlement to obtain additional real estate equity from the subsequent sale of an additional parcel of community real estate after the date of the Settlement Conference.[22]

The court further observed that the postsettlement benefits appellant "received, without complaint" after the July 8 settlement included the supplemental funding of Z-Line's retirement plan, which "enabled [appellant] to obtain full distribution of her

[22] Appellant's income and expense declaration filed on February 10, 2017, stated she held $370,000 in cash and deposit accounts, $7,888,000 in stocks, bonds and other easily sold assets, $325,000 in real and personal property.

retirement subaccount in excess of $1.6 million in value"; $112,000 for appellant's half of the sales proceeds from the sale of additional real estate; confirmation to her of additional IRA and 401k account assets and additional liquid asset accounts; automobiles with valuable equity; and the award of "various objects of art[], household furniture and furnishings, personal effects and jewelry of significant value." In addition, respondent's payment of $1.5 million, which was to be transmitted to appellant's counsel upon full implementation of the settlement agreement, was on deposit in his attorney's trust account awaiting further instruction from the court pending resolution of respondent's request for dismissal of appellant's set aside request.

Appellant made no showing to undermine the court's analysis of the benefits she derived from the settlement or to support her argument that she received "zero value" for her interest in Z-Line. She has shown no error in the court's conclusion that she failed to make a prima facie showing of entitlement to relief on grounds of inadequate disclosure.[23]

III.

Appellant further claims the judge abused his discretion in denying her request to set aside the judgment on grounds of mistake of fact. As she describes her claim, " 'at no time during or immediately after the July 8, 2016 Settlement Conference did I have the

[23] At oral argument, counsel for appellant suggested that while appellant's briefs focused on the issues concerning section 217 and the alleged denial of a hearing, this court could follow an alternative route of reversing the judgment on the basis of respondent's failure to disclose the existence of the business entities appellant claims to have been unaware of until after the settlement conference on July 8, 2016. Not only did appellant's briefs focus on other issues, they never suggested that nondisclosure of these business entities was a significant issue, much less a basis for reversal. The business entities were mentioned in appellant's briefs on this appeal 138 only in passing, in connection with her argument that she was denied the opportunity to cross-examine respondent; they were not mentioned at all in her argument that the judgment should have been set aside due to respondent's nondisclosures. As this issue was raised for the first time at oral argument, we decline to address it. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1554, fn. 9; *People v. Crow* (1993) 6 Cal.4th 952, 960.)

understanding that I was entering into any binding agreements with respondent. I believe that this understanding was confirmed by my attorney's rejection of the document prepared by respondent's counsel, and the failure of anyone to confirm the specific terms of any agreement or to present the document for signing on July 8, 2016.' "

The court denied relief on appellant's claim of mistake of fact on the ground that it was precluded by collateral estoppel, as the court had previously rejected appellant's " 'mistake of fact' arguments regarding the July 8, 2016 settlement proceedings" in approving the settlement agreement pursuant to Code of Civil Procedure section 664.6 and entering the judgment of dissolution incorporating the settlement agreement. Appellant argues that the court mischaracterized her claim in describing it as "based upon the assertion that [appellant] had a misunderstanding as to whether an enforceable settlement occurred on July 8, 2016." She maintains that during Code of Civil Procedure section 664.6 proceedings, the court precluded her from presenting evidence regarding her and her attorney's mistaken belief that no settlement was reached on July 8, and decided only whether an enforceable agreement was reached on July 8, 2016, not "the subsequent state of mind of [appellant] and her counsel."

"Collateral estoppel, also known as issue preclusion, 'prevents relitigation of previously decided issues. . . . [I]ssue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.' (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824–825.) An issue is ' "necessarily decided" ' by an order if the issue was not ' "entirely unnecessary" to the judgment in the initial proceeding.' (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342; see *Mega RV Corp. v. HWH Corp.* (2014) 225 Cal.App.4th 1318, 1344.)" (*Anne H. v. Michael B.* (2016) 1 Cal.App.5th 488, 498.)

Appellant correctly points out that in connection with the request to enter judgment pursuant to Code of Civil Procedure section 664.6, the court viewed issues related to relief under Code of Civil Procedure section 473 or set aside of the judgment as separate from respondent's request for entry of judgment. The court later explained that

it had said it would consider only arguments "relevant to the 664.6 issue and the proceeding that occurred on July 8th and the circumstances surrounding that," and directed appellant's attorney, "if you've got issues about fraud, about incomplete disclosure about duress, about anything else, you bring those up in a separate motion."[24] While the court did not expressly refer to mistake of fact, its remarks clearly encompassed all potential grounds for setting aside the judgment.

However, in connection with its decision to enter judgment under Code of Civil Procedure section 664.6, while the court struck significant portions of the declarations appellant submitted in opposition, it did *not* strike appellant's statement that she "left the Settlement Conference on July 8, 2016 with the understanding that a general framework for settlement had been proposed wherein I gave up my interest in our business and limited my spousal support in exchange for complete insulation from JIM and the businesses he had been running exclusively, but that the material terms were open, and that negotiations would continue. I observed my attorney's efforts to continue to negotiate, as well as MR. WHITING's failure and refusal to respond materially."[25] The issue appellant presented as a "mistake of fact" in seeking to set aside the judgment was thus directly before the court in connection with respondent's request for entry of judgment. That the issue was "actually litigated" is demonstrated by the court's finding

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[24] Respondent's statement that there is nothing in the May 4, 2016 reporter's transcript to support her allegation that she was precluded from presenting evidence regarding mistake of fact in connection with the Code of Civil Procedure section 664.6 proceedings is disingenuous. Contrary to respondent's assertion, the pages of the reporter's transcript to which appellant cited *do* exist. If respondent is in possession of a different transcript of the May 4, 2017 hearing than the one included in the record on appeal, as suggested by respondent's citation to the wrong reporter's transcript page earlier noted (see fn. 6, *ante*), counsel (who was also counsel below) should nevertheless have recognized the discussion to which appellant was referring.

[25] Nor did the court strike portions of appellant's attorney's declaration stating that he left opposing counsel's office on July 8, 2016, "with the clear understanding that negotiations were on-going and that no binding agreements had been reached" and that he "deliberately made it clear to all present in joint session that no enforceable Agreement had been reached."

that these statements were "of only marginal relevance" and "of no probative value" given its subsequent findings on respondent's request for entry of judgment.[26] The court was obviously aware of appellant's claim and rejected it as a basis for denying respondent's motion.[27]

Moreover, appellant fails to explain how her claimed mistake of fact could provide a basis for relief under section 2122. "Marital settlement agreements incorporated into a dissolution judgment are construed under the statutory rules governing the interpretations of contracts generally." (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439.) " 'Contract formation is governed by objective manifestations, not the subjective intent of any individual involved. [Citations.] The test is "what the outward manifestations of consent would lead a reasonable person to believe." [Citation.]' " (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1277, quoting *Roth v. Malson* (1998) 67 Cal.App.4th 552, 557.) Here, the "objective manifestations" are those described in the December 13 order and judgment—the parties' statements upon voir dire by the judge on July 8, 2016, that they

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[26] Those findings were that Code of Civil Procedure section 664.6 does not require the parties to enter stipulations before a court reporter but to present oral stipulations before the court; that a judge who heard the oral recitation of the stipulations and is later called upon to rule on a motion to enter judgment is permitted to rely upon his or her recollections when reducing the stipulations to a written order, that disputes arising after recitation and approval of the oral stipulations in the presence of the court are not evidence that an enforceable agreement was not reached; that on July 8, 2016, the parties entered into agreements with the concurrence of their attorneys, and upon voir dire by the court confirmed their understanding and willing approval of the agreements as recited by the court; that appellant, in voir dire, stated her understanding that the agreements included a full settlement of all her spousal support claims as described in the court's recitation; that respondent's declarations were consistent with the court's recollection and understanding of the circumstances and events of July 8, 2016; that the factual assertions in the declarations submitted in support of appellant were "largely lacking in credibility"; and that the September 22 order accurately set forth the parties' agreements that were orally approved on July 8, 2016.

[27] Appellant's characterization of the issue as her "subsequent state of mind," and that of her attorney, rather than the "existence, or lack thereof, of enforceable agreements" does not help her. Appellant offers no explanation how her *subsequent* state of mind could constitute a mistake of fact warranting setting aside the judgment.

understood and voluntarily agreed to the terms of the agreement recited by the judge. Appellant's subjective beliefs are not relevant in determining whether an enforceable agreement was formed.

A judgment may be set aside on grounds of mistake where one or both parties to the formation of the underlying contract was mistaken as to the terms or assumptions upon which the agreement was reached. For example, *Brewer, supra,* 93 Cal.App.4th at page 1346, upheld the trial court's decision to set aside a judgment and marital settlement agreement based on mistake where the husband did not have accurate and complete valuations of the wife's pension plans, which were essential to his agreement regarding financial issues. In *Binette,* where the parties executed a waiver of final declarations of disclosure stating they had complied with various statutory requirements but in fact had not done so, the court found "a mistake of fact by the parties regarding whether the statutory requirements had been satisfied." (*Binette, supra,* 24 Cal.App.5th at pp. 1133–1134.) *In re Marriage of Varner, supra,* 55 Cal.App.4th at page 144, held the ex-wife was entitled to have the judgment set aside due to mistake where the ex-husband had failed to disclose value of community assets.

Unlike these cases, in which one or both parties was mistaken about information that played a role in reaching agreement, appellant's claim is that she was mistaken as to whether an agreement had been reached. A mistake concerning the facts bearing upon an agreement may justify setting aside the resulting judgment because the mistaken party lacked information necessary to evaluate the proposed contract and decide whether to enter it. A mistake concerning whether an agreement was reached, by contrast, is a matter of subjective understanding which, if contrary to "objective manifestations" that would lead a reasonable person to believe agreement had been reached (*Allen v. Smith, supra,* 94 Cal.App.4th at p. 1277) does not invalidate the agreement.

Finally, even if appellant's mistaken belief could be the basis for relief under section 2122, she would be entitled to such relief only upon a showing that she would materially benefit from setting aside the judgment information. (§ 2121, subd. (b);

Brewer, supra, 93 Cal.App.4th at p. 1346.) As earlier explained, she has not made such a showing.

IV.

Appellant's final contention is that the judge was biased against her. She argues this bias is demonstrated by the judge's summary denial of her request to set aside the judgment, refusal to subject respondent's "unsubstantiated" declaration to cross-examination, making of "irrelevant findings" regarding appellant's assets, and imposition on appellant of "additional terms not contained in the original Order."

We have thoroughly considered appellant's claims of impropriety regarding determination of her set aside request without a hearing. Respondent's declaration was not "unsubstantiated": It was filed under penalty of perjury; attached a list of "records, documents, and information" provided and made available to appellant, her attorneys and her forensic accountant; referenced the declaration of Z-Line's CFO detailing records and documents that had been provided to appellant "on a continuing basis throughout this litigation"; and attached 27 exhibits as documentation of statements made in the declaration. The declaration also noted that appellant's attorneys had taken the deposition of Z-Line's former COO in January 2016, and participated in an evidentiary hearing on May 10 and 19, 2016, in which they "had the opportunity to question" respondent, the CFO and the accountant who "provided tax advice and oversight" to Z-Line. The court found that appellant failed to make a prima facie showing of grounds for setting aside the judgment on the basis of the pleadings and record, the procedure the parties had agreed it could employ.

We disagree with appellant's assertion that the judge's statements about her assets were irrelevant. The court's description of the "postsettlement benefits" appellant received was relevant to explain and illustrate the court's rejection of her claims by describing the full context in which the settlement took place, which undermined her claims of financial inadequacy, as well as her acceptance of benefits under the agreement she was challenging, which undermined her claim that she did not believe an agreement had been reached.

Although appellant refers to the judge having imposed additional *terms* beyond those included in the judgment, she describes only one, stating that the judge "stayed [respondent's] obligation under the 'agreement' pending [appellant] signing off on a 'Stock Power' document which states that [respondent] receives [appellant's] interest in Z-Line Designs 'For Value Received,' despite [appellant's] assertion at all times herein that [respondent] is receiving [appellant's] community property interest in Z-Line Designs, Inc. for zero value."

The stock power document to which appellant refers was offered by respondent's counsel for appellant's signature in January 2017, in order to transfer her interest in Z-Line to respondent as provided in the settlement agreement and judgment. After entry of the court's order granting respondent's request for entry of judgment in December 2016, the parties disputed whether respondent was required to immediately provide the $1.5 million settlement payment that the settlement agreement and judgment stated was to be paid within 24 hours of the judge's signing the order. Respondent had not transmitted the payment because appellant's counsel had been communicating appellant's intention to move to set aside the judgment and, in respondent's view, if she was successful in having the judgment set aside, she would not be entitled to collect the $1.5 million due under that judgment.

Respondent proposed the stock power after the court directed the parties' attention to the provision in the settlement agreement and judgment requiring each party to "promptly execute all documents and instruments as reasonably required to implement the provisions of this Agreement," noted that "implicit in any settlement is the understanding that each party is required to take all action reasonably necessary to implement the settlement provisions," and stated that appellant's execution of the documents necessary to transfer full ownership of Z-Line to respondent was "a precondition" to payment of the $1.5 million, which should be transmitted immediately upon her execution of the necessary documents. The parties then disputed inclusion in the stock power of the "for value received" language, appellant maintaining that "the 'settlement' imposed by Judge Spadafore on [appellant] awarded this community asset to

respondent for zero value" and respondent insisting that appellant had received and was continuing to receive value in consideration of her waiver of any interest in Z-Line as part of the overall settlement and judgment. Appellant refused to sign.

The court's January 2018 order rejected appellant's objection to the language of the stock power as based on the "inaccurate assertion" that she received no value for relinquishment of her interest in Z-Line. Noting that signing this document was the only remaining action required of appellant under the parties' settlement agreement, the court stated that if she executed the stock power, respondent's prompt payment of the $1.5 million would be required, but if she did not, respondent's obligation to pay the settlement amount was stayed pending further order of the court.

The requirement that appellant sign the stock power did not add an additional term to the settlement; it was a necessary step to implement the settlement's terms. As the court earlier explained, "[n]either party can 'cherry pick' provisions that they want to have enforced and ignore provisions that implicitly require their action to implement. To suggest otherwise is disingenuous, at best."

Appellant has demonstrated no basis for her claim that the court's orders reflect bias against her.

DISPOSITION

The "Findings and Orders re: Pending RFO Matters" filed on January 19, 2018, are affirmed.

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Kline, P.J.

We concur:

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Richman, J.

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Miller, J.

Sexton v. Sexton (A153901)